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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

State of Utah et al. v. Google LLC et al., Case No. 3:21-cv-05227-JD

In re Google Play Consumer Antitrust Litigation, Case No. 3:20-cv-05761-JD

Case No. 3:21-md-02981-JD

RESPONSE OF EPIC GAMES, INC. TO THE STATES, CONSUMER COUNSEL AND GOOGLE'S JOINT STATEMENT

Judge: Hon. James Donato

Epic Games, Inc. ("Epic"), the Plaintiff in Member Case No. 20-cv-05671-JD (*Epic v. Google*), hereby submits this response (the "Response") to correct certain misstatements concerning the terms of the injunction issued by this Court in *Epic v. Google* (MDL Dkt. 1017) (the "Injunction") made in a joint statement (the "Joint Statement") filed by the States, Class Counsel and Google (collectively, the "Settling Parties") (*see* MDL Dkt. 1067).

RESPONSE

On November 14, 2024, this Court directed the Settling Parties to file a joint statement addressing the consistency of their proposed settlement ("the Proposed Settlement") with the Injunction. (MDL Dkt. 1056.) On February 10, 2025, the Settling Parties filed the Joint Statement, explaining their view that the Proposed Settlement is consistent with the injunction such that the two "would operate without contradiction or dilution". (MDL Dkt. 1067 at 1.)

Epic does not take a position on the consistency of the Proposed Settlement and the Injunction, or of the propriety or adequacy of the Proposed Settlement, to which Epic is not a party. Epic files this Response only to correct the Settling Parties' mischaracterization, in the Joint Statement, of the operation and scope of Paragraph 5 of the Injunction. That Paragraph of the Injunction states:

> For a period of three years ending on November 1, 2027, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement by an app developer to launch an app first or exclusively in the Google Play Store.

(MDL Dkt. 1017 at 1.)

In the Joint Statement, the Settling Parties compare Paragraph 5 of the Injunction to Section 6.5.1 of the Proposed Settlement, which, if approved, would prohibit Google from entering or enforcing any provision of an agreement that commits a developer to launching its apps in the Google Play Store "at the same time [as] or earlier than it launches them on any other app store for Mobile Devices". (MDL Dkt. 1067 at 4.) The Settling Parties claim in the Joint Statement that Section 6.5.1 of the Proposed Settlement is broader than Paragraph 5 of the Injunction, in relevant part, because Section 6.5.1 "prohibits not only agreements requiring apps

to be launched on the Play Store *before* they are launched elsewhere, but also those requiring that apps be launched on the Play Store *simultaneously* with their launch elsewhere (*i.e.*, sim-ship)". (*Id.* at 5 (emphasis in original).) That is a mischaracterization of the prohibition in Paragraph 5 of the Injunction.

Paragraph 5 of the Injunction, as noted above, prohibits agreements requiring a developer to launch its app on the Google Play Store exclusively or "first". Contrary to the Settling Parties' claim, the term "first" in this context encompasses (and thus prohibits) agreements that require a developer to launch its apps on Google Play at the same time that it launches on any other store (*i.e.*, sim-ship agreements); it is in no way limited to agreements requiring a developer to launch on the Google Play Store *before* it launches on other stores. This conclusion is mandated here for at least the following reasons.

First, the Settling Parties' proposed reading of the term "first" would render that term entirely redundant, given Paragraph 5's explicit prohibition on exclusivity arrangements. Indeed, any requirement to launch on the Google Play Store *before* launching on any other store is, by definition, a requirement to launch *exclusively* on the Google Play Store for some period of time. Such an arrangement is thus separately prohibited by the Injunction's specific, explicit prohibition on exclusivity arrangements. *See B2B CFO Partners, LLC v. Kaufman*, 2012 WL 1067904, at *3 (D. Ariz. Mar. 29, 2012) ("The Court looks to the plain language of the injunction, construing it so as to give effect to every part of the document."); *Oracle USA, Inc. v. Rimini St., Inc.*, 2021 WL 1224904, at *16 (D. Nev. Mar. 31, 2021) (explaining that an injunction should not be interpreted in a way that "would render . . . provisions of the injunction superfluous").

Second, a sim-ship requirement ***is*** a requirement to launch first on the Google Play Store, alongside simultaneous "first" launches on other stores, because it prohibits the developer from launching on the Google Play Store *second* (or third, or fourth) in time. Nothing about the term "first", in and of itself, renders it inapplicable to sim-ship requirements that prevent a developer from launching its apps on other stores ahead of launching it on the Google Play Store.

Third, the injunction must be read in the context of the jury verdict. *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y,* 774 F.3d 935, 949 (9th Cir. 2014) ("In deciding whether an injunction has been violated it is proper to observe the objects for which the relief was granted . . . ."); *see also Salazar v. Buono*, 559 U.S. 700, 762 (2010) (Breyer, J., dissenting) ("A court should construe the scope of an injunction in light of its purpose and history, in other words, 'what the decree was really designed to accomplish.' Courts have long looked to 'the objects for which the [injunctive] relief was granted, as well as the circumstances attending it,' in deciding whether an enjoined party has complied with an injunction.") The jury in *Epic v. Google* explicitly found Google's Project Hug agreements—all of which were sim-ship agreements—to violate the antitrust laws. (MDL Dkt. 866 at 5; MDL Dkt. 984 at 17-20 ("In exchange for significant payments from Google, developers who signed a Project Hug agreement 'could not launch [an app] either *first* or exclusively on any competing Android distribution platform'. . . . This and similar trial evidence demonstrate that the jury's findings on Google's anticompetitive conduct were well supported." (emphasis added)). Against the backdrop of the jury's verdict, Paragraph 5 is clearly intended to enjoin Google from entering Hug-like agreements. The Settling Parties' strained reading suggests the Court's Injunction simply ignores the jury verdict and does not address anticompetitive agreements the jury expressly held to be illegal. That is not a reasonable reading of the Injunction in context, and as such, it should be rejected. *Alston v. Nat'l Collegiate Athletic Ass'n*, 958 F.3d 1239, 1261 (9th Cir. 2020) ("We construe injunctions in 'context' and 'so as to avoid . . . absurd result[s]'.")

Dated: March 3, 2025

Respectfully submitted,

By: /s/ *Gary A. Bornstein*
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